

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-120927-001 DT

04/05/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

SUSAN L LUDER

v.

ROGER ANTHONY MATLIN (001)

LAWRENCE I KAZAN

NORTH VALLEY JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number JC 2011-120927.

Defendant-Appellant Roger Anthony Matlin (Defendant) was convicted in the North Valley Justice Court of disorderly conduct. Defendant contends the trial court erred in denying his Motion for a New Trial, which alleged the verdict was contrary to the weight of the evidence and that his words were constitutionally protected speech. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 14, 2011, Defendant was cited for assault, A.R.S. § 13-1203(A)(3), and disorderly conduct, A.R.S. § 13-2904(A)(3). The evidence presented at trial showed the following. On March 14, 2011, the City of Goodyear held a City Council meeting. (R.T. of Jan. 5, 2012, at 12.) At that time Paul Luizzi was the interim fire chief for the Goodyear Fire Department. (*Id.* at 30, 77-78.) Luizzi had been sitting in the last row of seats, and after the meeting, was talking with Ron Lilley, who was the Captain of the Goodyear Fire Department. (*Id.* at 8, 16, 81-82.) Brian Dalke, the Deputy City Manager approached him and asked to talk to him. (*Id.* at 16-17, 41, 46-49, 81-82.) While Luizzi was talking to Dalke, Defendant approached behind them and stated in an agitated, hostile, and loud manner that he wanted to talk to Luizzi. (*Id.* at 16, 18, 19, 23-24, 39, 50, 59, 83-84.) Luizzi told Defendant he would have to wait until he finished talking to Dalke, but Defendant became even more hostile and aggressive, pushed a chair out of the way, and confronted Luizzi. (*Id.* at 20, 51, 59, 84-85, 96, 98.) With his finger, Defendant poked Luizzi in the chest and said to him, "Fuck you, I know what the department does; I'm taking the department down; I'm taking you down." (*Id.* at 52-53, 55, 60-63, 69, 71, 85-87, 102.) Luizzi started

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to move away from Defendant, but Defendant grabbed Luizzi's left arm and tried to pull Luizzi toward him. (*Id.* at 26, 86–89, 97, 98, 99, 102.) Luizzi moved his left arm away to break Defendant's grasp and said, "Don't touch me, leave me alone." (*Id.* at 21, 26, 89.) Luizzi moved away and spoke to Dalke, but Defendant kept coming toward him, so Luizzi moved a chair between them to keep Defendant away. (*Id.* at 55, 70, 89–90.) At that point, Luizzi felt physically threatened by Defendant. (*Id.* at 90, 97–98.) Dalke told Lilley to call the police, so Defendant left. (*Id.* at 22, 28, 53, 76.)

Based on the above evidence, the trial court found Defendant guilty of disorderly conduct and not guilty of assault. (R.T. of Jan. 5, 2012, at 117–18.) On January 17, 2012, Defendant's attorney filed a Motion for New Trial contending the verdict was contrary to the weight of the evidence, and further contending Defendant's conduct was protected by the First Amendment. On March 12, 2012, the trial court issued a written minute entry denying Defendant's motion. On March 29, 2012, the trial court imposed sentence. (R.T. of Mar. 29, 2012, at 17.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Was the verdict contrary to the weight of the evidence.*

In his Motion for New Trial, Defendant contended the verdict was contrary to the weight of the evidence. Defendant's case is similar to *In re John M.*, 201 Ariz. 424, 36 P.3d 772 (Ct. App. 2001), who was also convicted of violating A.R.S. § 13–2904(A)(3), which provides as follows:

A. A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:

....

3. Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person

A.R.S. § 13–2904(A)(3). In that case, the evidence showed the juvenile threw a partially full can of soda at Jennifer, an African-American woman, striking her in the chest, and yelled "nigger" at her, and later yelled "fuck you, you god damn nigger" at Jennifer's roommate Marla, who was also African-American. *John M.* at ¶¶ 2–3. The juvenile contended his act of throwing the soda can at Jennifer was not a "gesture" as is required by the statute. The court noted one dictionary definition of "gesture" was "a movement usu[ally] of the body or limbs that expresses or emphasizes an idea, sentiment, or attitude." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 515 (1984). *John M.* at ¶ 10. It then stated:

We deduce from these definitions that the operative component of the term "gesture" is a physical act intended to communicate a thought or feeling.

John M. at ¶ 11.

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In the present case, the evidence showed Defendant stated to Luizzi in an agitated, hostile, and loud manner that he wanted to talk to him. When Luizzi told Defendant he would have to wait, Defendant became even more hostile and aggressive, pushed a chair out of the way, confronted Luizzi, poked Luizzi in the chest with his finger, said "Fuck you, I know what the department does; I'm taking the department down; I'm taking you down." When Luizzi moved away from him, Defendant grabbed Luizzi's arm and tried to pull Luizzi toward him. This Court concludes both of Defendant's acts of (1) poking Luizzi in the chest with his finger and (2) grabbing Luizzi's arm and pulling Luizzi toward him was a "physical act" by which Defendant "intended to communicate" to Luizzi Defendant's "thought or feeling" that Defendant would talk to Luizzi no matter what Luizzi might want. Thus, this Court concludes both the finger poking and the arm grabbing were "gestures" as contemplated by the statute.

The statute further requires the gesture to be abusive or offensive. The evidence showed Luizzi said "don't touch me, leave me alone" and felt physically threatened by Defendant. This Court therefore concludes each of these gestures was abusive or offensive.

Finally, the statute requires the person to use the abusive or offensive gestures against another person in a manner likely to provoke immediate physical retaliation by that other person. "Retaliate" is defined as "to return the like for; to repay or requite in kind; to put or inflict in return; to return like for like." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1938 (1961). This Court concludes Luizzi's action of pulling his arm away from Defendant would fit under this definition of "retaliate" or "retaliation" in that, if a person grabs the arm of another person against that other person's will, it is likely this will provoke the other person immediately to pull their arm away from the person. Based on the above, this Court concludes the evidence supported the trial court's finding that Defendant's conduct violated the statute.

B. Was Defendant's conduct protected by the First Amendment.

Defendant contends his conduct was protected by the First Amendment. Defendant cites no authority that holds the First Amendment grants to a person the right to poke another person in the chest and then grab that other person's arm against that other person's wishes. This Court therefore concludes Defendant's assaultive behavior was not permissible under the First Amendment.

For authority, Defendant cites *In re Nickolas S.*, 226 Ariz. 182, 2458 P.3d 446 (2011). For two reasons, this Court does not believe that case supports Defendant's position.

First, *Nickolas S.* involved a violation of A.R.S. § 15-507, which makes it a crime for a person to knowingly abuse a teacher or a school employee, while Defendant was found guilty of violating A.R.S. § 13-2904(A)(3), which has different elements. Because of the different elements in these two statutes, this Court concludes the reasoning in *Nickolas S.* does not apply to Defendant's case.

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Second, *Nickolas S.* involved only words the student spoke to the teacher. In the present case, Defendant's conduct involved the physical acts of poking the other person in the chest and the grabbing of the other person's arm. This Court concludes the analysis that applies to spoken words only does not apply to physical acts against another person.

Moreover, even if *Nickolas S.* did apply, this Court concludes Defendant's words, when viewed in the context of Defendant's actions, amounted to "fighting words." In *Nickolas S.*, the court adopted a three-step inquiry: (1) The words must be directed at a particular person or group of persons, thus there must be an addressee; (2) the words must be personally abusive epithets or insults that, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction; and (3) the words must be evaluated in the context in which they are used to determine if it is likely that the addressee would react violently. *Nickolas S.* at ¶ 24. Defendant concedes the first step is met because his words were directed to a particular person, Mr. Luizzi.

For the second and third steps, the court in *Nickolas S.* seems to be saying the court must (second step) determine whether the words are inherently likely to provoke violent reaction when addressed to the ordinary citizen, and must then (third step) determine whether the words are inherently likely to provoke violent reaction when addressed to someone who is *not* an ordinary citizen, but is instead someone in circumstances that makes it likely they would act differently than the ordinary citizen. *Nickolas S.* at ¶ 28.

Applying the second step to the present situations shows Defendant's words, when viewed in the context of Defendant's actions, amounted to "fighting words." Defendant ignored Luizzi's advice that Defendant would have to wait his turn. Instead of waiting, Defendant became even more hostile and aggressive, pushed a chair out of the way, confronted Luizzi, poked Luizzi in the chest with his finger, said, "Fuck you, I know what the department does; I'm taking the department down; I'm taking you down." When Luizzi moved away, Defendant grabbed Luizzi's left arm and tried to pull Luizzi toward him, which caused Luizzi to feel physically threatened by Defendant. This Court concludes Defendant's actions were likely to provoke violent reaction when addressed to the ordinary citizen.

For the third step, Defendant contends, because Luizzi was a public official, he should not have felt physically threatened by Defendant and thus Defendant's actions were not likely to provoke violent reaction. For two reasons, this Court does not agree with Defendant's contention. First, when a person grabs another person's arm against that person's wishes, that other person has just as much right to pull their arm away whether they are an ordinary citizen or a public official. Second, the recent events of (1) an assistant district attorney in Texas being killed, (2) a department of corrections chief in Colorado being killed, (3) a district attorney in Texas being killed, and (4) a sheriff in West Virginia being killed show public officials are just as susceptible to physical injury as are ordinary citizens.

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III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant's actions violated the statute and Defendant's actions were not protected by the First Amendment.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the North Valley Justice Court.

IT IS FURTHER ORDERED remanding this matter to the North Valley Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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